

# CMRS SPECTRUM CAPS

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## THE PUBLIC INTEREST IS WELL SERVED BY MAINTAINING THE CMRS SPECTRUM CAP

- Spectrum caps have promoted an increasingly competitive CMRS marketplace.
  - CMRS competition is not irreversible.
  - Lifting or removing the spectrum cap will result in consolidation.
  - Such consolidation will likely involve carriers with a national presence.
  - The result will be the elimination of one or more competitors in hundreds of geographic markets.
  - Consolidation will reduce pricing pressures and will reduce the incentive to offer innovative services.
- The burden of proof to change the current rules is on the proponents of raising or eliminating spectrum caps.
  - Section 11: the FCC “shall determine whether the [relevant] regulation is no longer necessary in the public interest as a result of meaningful economic competition between providers of such service.”
    - Core inquiry is the public interest.
    - Mere existence of competition is not sufficient to justify repeal. Competition is necessary but not sufficient to justify repeal.
    - If cap is needed to maintain competition, it is still in the public interest.
    - FCC must affirmatively determine that the rule “is no longer in the public interest.”
- Spectrum caps are minimally intrusive and allow the FCC to maintain a “hands-off” approach to regulating the CMRS industry.
  - Bright line rule provides certainty.

## ECONOMIC ARGUMENTS DO NOT SUPPORT ELIMINATION OF THE CAP

- The spectrum cap does not impede carriers from attaining economies of scope.
  - Even if economies of scope could be attained, the FCC must determine if they outweigh the anti-competitive effects.
  - Critical inquiry: the public interest, not the interest of private parties.
- CMRS market is unique. The key input -- spectrum -- is perfectly inelastic.
  - No matter how much prices go up, the supply of spectrum will not change.
- Even assuming that carriers are capacity constrained, allowing two such carriers to merge does not solve the problem.
  - Result: removal of a competitor; continued capacity shortage.

## DOJ ANTITRUST REVIEW IS NOT ADEQUATE TO PROTECT THE PUBLIC INTEREST

- DOJ does not review spectrum acquired at auction.
- DOJ review of mergers does not encompass public interest considerations critical to CMRS service.
- Congress gave FCC, the expert agency, a special role in regulating CMRS markets: “to protect the public interest in the use of spectrum” by “promoting economic opportunity and competition” and “by avoiding excessive concentration of licenses.”
  - FCC role: to promote competition.
  - DOJ role: limited to stopping mergers that would “substantially lessen competition”.

## THE FCC'S WAIVER PROCESS PROVIDES APPROPRIATE RELIEF

- Carriers have provided no empirical evidence to support their assertions regarding spectrum exhaustion.
- There are few markets where carriers are even at the spectrum cap levels.
- To date, no market-specific waivers have been requested.
- The case-by-case waiver review process better serves the public interest than wholesale elimination of the spectrum cap.
  - The fact that one carrier might need additional spectrum to meet anticipated demand in a handful of markets does not justify eliminating the spectrum cap for all carriers in all markets.
- The FCC should expeditiously grant bona fide waiver requests.

## ANY NEW SPECTRUM ALLOCATED TO CMRS MUST BE SUBJECT TO A PROPORTIONAL SPECTRUM CAP

- Current rule : 45 MHz cap (25% of available spectrum).
- Assures a minimum of 4 competitors.
  - NPRM: “if mobile voice markets were to stabilize as three-firm oligopolies, recently observed price competition could be reduced or eliminated.”
- Proposed rule for new CMRS spectrum:
  - 25% limit for old plus new spectrum.
  - Maintain 45 MHz (25% limit) for old spectrum so as to ensure that as new spectrum is made available, and the cap is adjusted, incumbent carriers do not simply buy other incumbent carriers.
  - Goal: to encourage incumbents to bid on, develop and build independent networks for advanced services.

